87-1404

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

DAVID ISRAEL NAMER,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-3128

UNITED STATES OF AMERICA,

Plaintiff-Appellee

VERSUS

DAVID ISRAEL NAMER,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

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(January 4, 1988)

Before GOLDBERG, POLITZ, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

This case has been tried twice and appealed twice. The first trial concluded in convictions which the trial court set aside because of improper closing arguments by the prosecutor. In the second trial, David Israel Namer was convicted of conspiracy, 18

U.S.C. §371, and three substantive counts in violation of 18 U.S.C. §§2, 1343, and 2314. On his first appeal Namer challenged, inter alia, the trial court's refusal to suppress certain evidence seized during execution of a state search warrant.

Upholding the challenge, we concluded that the affidavit upon which the warrant was based contained a "crucially material... misrepresentation [which] was made, at the least, with reckless disregard for the truth." United States v. Namer, 680 F.2d 1088, 1094 (5th Cir. 1982). We found the search warrant faulty for lack of probable cause to support its issuance and remanded for a hearing and findings on the doctrines of independent source, attenuation, inevitable discovery, and harmless error. Id. at 1090.

On remand, the district court conducted an evidentiary hearing, found all four

doctrines applicable and denied the motion for a new trial. Namer appeals. We are bound to accept the factual findings of the district court, unless we deem them clearly erroneous. Based on those findings, for the reasons assigned, we affirm.

Background

Many of the essential facts are set forth in our prior opinion. 680 F.2d 1088-91. We note additional facts, some developed on remand, and underscore those most critical to today's decision.

Namer, doing business as Financial Management Services, Inc., offered to secure loan commitments for the permanent financing of various building projects. Typically, such capital projects require interim, short-term financing during construction, followed by permanent, long-term financing upon comple-

tion of construction. The commitment of a permanent financier is a threshold requirement for the usual interim financing agreement.

In a typical scenario, a party wishing to build or develop would engage the services of a loan broker to obtain a commitment for permanent financing from a lending institution. For a fee, the broker would prepare and submit the necessary application, with its myriad attachments. Namer's practice required advance payment of the broker's fee, subject to a refund if a commitment was not obtained. Armed with the standby or permanent commitment, the investor-developer could approach short-term lenders and request the funds needed for land acquisition and construction.

Three such transactions are involved in the instant convictions. The first

relates to a standby commitment to Tropic Sales and Development, acting through Richard Gazie and Terry Ziegler, for a real estate project in Florida. The second involved a commitment to Astro Bowling Center, represented by Louis LaDuke, for a bowling alley project in Texas. The third transaction related to a proposed drydock facility in Louisiana, involving Gilmar Marine and its parent corporation, Gilco, represented by Raymond Smego and Anthony Fiasco.

Namer secured commitments for Tropic Sales and Gilmar, and attempted to get a commitment for Astro Bowling from Sinton Service Corporation, a wholly-owned subsidiary and service arm of Sinton Savings Association, a Texas savings and loan institution. In the relevant instances Sinton Service was represented by Jerry Simmons, a vice-president, who was directly accountable to

the president of Sinton Savings, Robert Cartwright.[1]

When Namer was getting the two commitments and working on the third, Sinton Services was insolvent, incapable of funding the commitments, and under instructions from state banking authorities to refrain from issuing commitments.

The conspiracy count charged Namer and Simmons with conspiring to defraud investors by causing them to pay fees for worthless commitments. Each of the three transactions spawned substantive counts, involving either use of the mails, 18 U.S.C. §1343, or inducement of interstate travel, 18 U.S.C. §2314. Namer was convicted of the conspiracy count, two interstate travel counts regarding the Smego and Fiasco transac-

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[1]Cartwright was convicted of fraudulent activities involving Sinton Service. United States v. Cartwright, 632 F.2d 1290 (5th Cir. 1980).

tions, and one wire fraud count respecting the LaDuke transaction. He was acquitted of an interstate travel count involving LaDuke, and a wire fraud and interstate travel count relating to transctions with Gazie and Ziegler.

It is significant to note that all of the convictions were based on events occurring after August 2, 1977, the date Gazie informed Namer of Sinton's insolvency. The acquittals related to events occurring prior to that date.

Namer's activities drew the attention of the Orleans Parish District Attorney's office in late 1976 when it received the first of four complaints against him. LaDuke complained on November 3, 1977. The Orleans Parish District Attorney secured a search warrant for Namer's records and caused it to be executed. On the earlier appeal we found

that warrant constitutionally infirm. Namer complains specifically of three items of evidence gathered during that illegal search and resultant testimony:

(1) two letters linking Namer with Sinton Service which referenced LaDuke;
(2) a loan commitment form for Tropic Sales from Jerry Simmons; and
(3) the testimony of Ziegler and Gazie.

Namer contends that since the documentary evidence was tainted by the unconstitutional search and seizure, everything derived from that tainted source should be excluded from evidence. The obvious critical fruit is the testimony of Gazie and Ziegler about the August 2 telephone call which, Namer insists, derived directly from leads gathered in the faulty search.

To place Namer's challenges in perspective we must attempt a sequential unfolding of the criminal investigations,

either explicit or implicit in the trial court's findings or else not seriously questioned in the trial evidence.

The state investigation proceeded under the guidance of Pauline Hardin, then a state assistant district attorney. When she became an assistant United States Attorney a federal investigation was commenced. The records compiled by the Orleans Parish District Attorney, including the paperwork seized in the illegal search, were subpoenaed to the federal grand jury. Notably, the original four complaints about Namer, all predating the seizure, were numbered amongst those records.

Evidence reflects that in 1977 the FBI in Dallas was investigating Simmons, Cartwright, and Sinton Services. A Dallas FBI agent uncovered a commitment to Gilmar Marine, and on February 10, 1978 he sent a

lead to the New Orleans FBI office for the interview of William O. Clay, Gilmar's representative in Baton Rouge. This Dallas FBI agent had no knowledge of the state search or of its product. Four days later Clay was interviewed and he connected Gilmar to Sinton and Namer. At this point, the agent became aware of the pending fraud investigation of Namer. Simultaneously with the interview of Clay, and pursuant to the Dallas lead, the Pittsburgh FBI office was alerted; it informed New Orleans of the information that Gilmar's attorney had furnished that office. The Pittsburgh office had no knowledge of the state search when it was contacted by Gilmar's attorney.

On March 3, 1978, Kim Peterson, an FBI informant in Houston, contacted FBI agent Rollen Powell in New Orleans and connected Namer, LaDuke, Simmons, and Sinton. LaDuke

was invited to the United States Attorney's office and was interviewed on March 9, 1978. At that time LaDuke furnished a letter from Namer and a cancelled check which LaDuke had given Namer for the fee. The check reflected the name of Namer's bank. On that same day the United States Attorney subpoenaed Namer's bank records referring specifically to items connected with the parties who had complained to the district attorney. Although no reference was made to Tropic Sales, the subpoena requested all data on Namer's account between April and December 1977.

Upon receipt, the FBI did a workup of the bank records. Agent Powell then made a four-page redaction which listed more than two-score suspect transactions. Included were a $22,000 wire transfer from Tropic Sales to Financial Management Services dated July 1, 1977, and a $14,200 wire transfer a

few days later from Financial Management to the account of Sinton Service, referencing a Tropic Sales commitment.

After sorting out this information, on June 9, 1978 agent Powell "set" a lead to his Miami counterparts suggesting a contact with Tropic Sales. On June 15, 1978 an interview of Gazie and Ziegler produced a copy of the Sinton commitment and information about communications with Namer, particularly about a telephone call on August 2, in which Gazie told Namer of Sinton's insolvency.

District Court Findings

The district court found five units of evidence derived from sources independent of the information gathered in the tainted search. All testimony and documentation relating to Gilmar Marine was found to be the product of the complaint by Gilmar's attorney

to the FBI in Pittsburgh; alternatively, it derived from the lead from the Dallas agent to the New Orleans FBI which came before the search. A trace of Gilmar's payment to Namer would have disclosed Namer's bank account.

The court also found that information and documentation from LaDuke and his attorneys were the direct result of LaDuke's complaint to the district attorney, made before the search, and his subsequent interviews with the FBI and United States Attorney.

The court further found that information reflecting the involvement of Simmons and Namer came from the ongoing independent Texas investigation. In addition to the lead to Clay, there was Peterson's advisory to Powell, all completely independent of the state search data.

Finally, and of paramount importance, the court found that Namer's bank records, which were uncovered by the grand jury subpoena, came from an independent source.

Having made these findings, the court further found that the challenged Simmons/Namer correspondence referencing LaDuke was merely duplicative of untainted material and was therefore harmless. The court found that the testimony of Gazie, Ziegler, and Simmons fell under the reach of the inevitable discovery and attenuation exceptions. The most intensely disputed issue is whether the Gazie and Ziegler testimony, obviously vital to the convictions when one views the dates behind the convictions and acquittals, comes within the inevitable discovery exception. The trial court so found and concluded. We are persuaded that the factual findings pass appellate

muster. From that linchpin, we find that the trial court's legal conclusions are correct.

Analysis

It is not an overstatement to say that the government's case rests on the subpoenaed bank records. That the name of Namer's bank came from an untainted, independent source -- LaDuke -- is not contested. Rather, Namer contends that because of the tainted information the FBI focused on Tropic Sales and ferreted out the damning evidence of Gazie and Ziegler. The trial court found otherwise. The record contains sufficient evidence to support that finding.

As above noted, agent Powell set the Tropic Sales lead to Miami. He testified about that matter twice: first at a 1980 suppression hearing involving a different

defendant on a non-related issue, and again in 1987 pursuant to our remand. A close reading of his testimony reflects adequate support for the finding that he routinely set the Tropic Sales lead along with several others after analyzing the bank records. Powell testified that he did not use the tainted Tropic Sales commitment in setting the Miami lead. His testimony is corroborated by the text of the teletype lead which advised "victim identified by money transfer wire certificate from... Tropic Sales."

Evidence that is the fruit of unlawful government conduct is subject to suppression, Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), as is evidence resulting from exploitation of the tainted source, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1959). The rationale is

that the constable is not to be placed in a better position by virtue of his illegal conduct. The core inquiry is whether the police would have discovered the evidence if the misconduct had not occurred.

This inquiry trifurcates into closely-related exceptions to the exclusionary rule: (1) independent source, Silverthorne Lumber; (2) attenuation, Wong Sun; and (3) inevitable discovery, Nix v. Williams. The Silverthorne court taught that if facts were gathered from a tainted source as well as from a discrete, clean source, "they may be proved like any others." 251 U.S. at 392. The Nix court explained that this "ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct." 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)(emphasis in original).

Several years before the Nix decision, the inevitable discovery doctrine was adopted in this circuit. United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980). In this seminal case we concluded that the government must show "that when the illegality occurred [the authorities] possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness...." Id. at 1048. In United States v. Miller, 666 F.2d 991 (5th Cir. 1982), this requirement was broadened. In Miller, an illegally seized diary led to certain witnesses. At that time, the police had no leads to those witnesses. Subsequently, the defendant confessed "which provided an independent legal source for the disputed evidence." Id. at 997. We concluded that "the testimony produced at trial, which stemmed indirectly

from the tainted source, was inevitably discoverable apart from reliance on the unlawful source." Id.

Following the Nix court's adoption of the inevitable discovery doctrine, we expanded our earlier holdings. In United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985), we held that "[i]n certain circumstances, however, such as when the hypothetical independent source comes into being only after the misconduct, the absence of a strong deterrent interest may warrant the application of the inevitable discovery exception without a showing of active pursuit by the government in order to ensure that the government is not unjustifiably disadvantaged by the police misconduct." Id. at 1206 (emphasis supplied).

The Cherry case, by negative implication, guides today's disposition, for in

Cherry there were no untainted leads, as there are in the case at bar, and in Cherry we upheld the admission of fingerprints taken from an incriminating vehicle which matched the defendant's prints taken after his arrest. The arrest was faulty. We concluded that because there was an independent basis for probable cause and arrest, it was inevitable that the government would have pursued the fingerprint evidence. That scenario broadly fits that now before the court.

Neither Nix nor our precedents mandate that the specific leads to Tropic Sales had to be in place before the illegal state search was conducted. It suffices that triggering data, likely to precipitate further investigation, was known to the authorities with responsibility in the subject investigation. LaDuke's complaint, and his connecting of Sinton with Namer, the

Clay lead from the Dallas FBI office, the complaint to the Pittsburg FBI office by Gilmar's attorney, and the informant's report to Powell are independent sources -- independent sources which likely would have led to the same information. As such, this evidence qualifies for the independent source exception.

The same applies to the inevitable discovery exception. The Supreme Court has not yet provided a specific definition of inevitability. In Brookins we defined it as a "reasonable probability that [the] witness would have... been discovered," 614 F.2d at 1048, and that normal police practices would have uncovered the information. In United States v. Amuny, 767 F.2d 113, 1129, rehearing denied en banc, 775 F.2d 301 (5th Cir. 1985), we implied that at a minimum, the government would have to offer a theory as to

the manner in which agents would have made their discovery. We agree with the commentators that emphasis is on "would" not "might" or "could," (W. LaFave, Search and Seizure, 624-25 (1978) Supp. 331 (1986)).[2]

There were at least two pertinent FBI investigations proceeding simultaneously. The evidence is sufficiently persuasive that the agents ultimately would have examined all obvious Sinton contacts. Once Namer's bank records were displayed, that contact was apparent and routine investigatory procedures could and did lead to Gazie and Ziegler. The LaDuke matter was carried to the authorities by LaDuke himself.

Diligent and extremely able counsel for defendant would posit that the key ques-

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[2]Defining inevitability is not without difficulty. For example, see United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980), and United States v. Finucan, 708 F.2d 838 (1st Cir. 1983).

tion is whether leads were placed on all sources of deposits to Namer's account. We decline the invitation to fix that requirement. We are persuaded that the relevant inquiry directed by Nix, and consistent with our precedents, is whether leads were set on all transactions identified as being connected with Sinton, for the other investigation focused on Sinton, and the other sources of information led to Sinton. The district court found that the government had carried its burden of showing by a preponderance of the evidence that the discovery of Gazie and Ziegler was inevitable. We agree.

Discussion of the third exception, attenuation, need not burden this opinion long. Having ruled that the disputed evidence was admissible under the independent source and inevitable discovery exceptions to the exclusionary rule, we need only comment

briefly. Under the holdings and rationales of United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); United States v. Mergist, 738 F.2d 645 (5th Cir. 1984); and United States v. Miller, supra, the exception applies to the facts of this case. The availability of a legitimate source reduces the deterrent effect of the exclusionary rule and tilts the balance between "the social cost of exclusion against the efficacy of exclusion in deterring illegal police misconduct," United States v. Miller, 666 F.2d 991 (1982), in favor of admission.

Having concluded that the evidence was admissible, we need not address the harmless error issue. It necessarily becomes moot.

Finally, Namer raises an issue of collateral estoppel, contending that because

he was acquitted of substantive counts for events before August 2, 1977, evidence of matters occurring prior to that time should have been excluded. On retrial, the court allowed testimony about pre-August 2, 1977 incidents with Gazie and Ziegler to provide background for the Gazie/Namer telephone call of that date. In addition, the court allowed introduction of evidence from Texas banking authorities concerning the insolvency of Sinton, offered to prove bad intent of the co-conspirators Cartwright and Simmons, a necessary item of proof.

Namer does not object to the ruling but, rather, the use the government made of the admissible evidence. He maintains that when the prosecutor argued that there was evidence of Namer's intent to defraud prior to July 1, 1977, this constituted a relitigation of issues already determined in Namer's

favor by the first jury. As such, Namer contends that the double jeopardy clause of the fifth amendment is implicated.

We agree that the prosecutor made improper references to pre-August 2, 1977 incidents during the closing argument. Assuming, per arguendo, that there was constitutional error, we must measure the degree, for there is constitutional harmless error only if the reviewing court concludes that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." Blackburn v. Cross, 510 F.2d 1014, 1019 (5th Cir. 1975)(collecting authorities).

Namer contends that "collateral estoppel operates to bar the introduction or argumentation of certain facts necessarily established in a prior proceeding." United States v. Lee, 622 F.2d 787, 790 (5th Cir.

1980); accord United States v. Kalish, 780 F.2d 506 (5th Cir. 1986). He correctly states the proposition, but we are not in agreement with his conclusion. The Blackburn case appears factually to be the closest to the one at bar. In Blackburn, in the closing argument the prosecutor relied on the combined effect of the testimony of the victim in the sexual assault case before the jury, and that of the victims in two other sexual assault cases, for one of which the defendant had been acquitted. The prosecutor directed the jury's attention to identifications by the other victims. The Blackburn court understandably concluded that the court could not say that the testimony of the previous victim, as to whom Blackburn had been acquitted, was harmless beyond a reasonable doubt. A new trial was ordered.

The instant case differs. Although Namer forcefully maintains that Gazie's testimony was unreliable, we are not prepared to make what is inherently a credibility call different from that made by the jury. Namer challenged Gazie's testimony about the critical telephone call. We can only read the convictions and acquittals one way -- the jury believed Gazie. We are persuaded beyond peradventure that it was Gazie's testimony, along with the other evidence and the fabric of the entire case, that convicted Namer, not the impermissible comments of the prosecutor in closing argument.

In so concluding, we note that the prosecutor repeatedly told the jury that the testmony of Cartwright and Simmons related only to Namer's conspiratorial acts after August 2, 1977, and that the testimony of the Texas banking authorities was offered to show

that the commitments were worthless. The prosecutor here did not dramatically dwell on those matters as the basis of Namer's guilt as the prosecutor had done in Blackburn. Further, the court instructed the jury that they could consider only the charges in the indictment before them. There was no charge based on events prior to August 2, 1977.

For these reasons, Namer's convictions are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
versus	NO. 79-0402
DAVID NAMER	SECTION: E (5)

FINDINGS AND CONCLUSIONS

This matter was remanded with directions by the United States Court of Appeals, Fifth Circuit, United States v. Namer, 680 F.2d 1088 (1982). The Court stated:

> David Israel Namer was convicted of various federal crimes arising out of a fraudulent loan brokerage scheme. The prosecution secured evidence used at his trial as a result of a search and seizure of Namer's complete office records conducted by Louisiana officials pursuant to a broad search warrant issued by a Louisiana magistrate. The district court denied Namer's motion to suppress evidence seized during and derived from the search. On appeal, Namer argues that the warrant was invalid under the probable cause and particularity clauses of the fourth amendment. We reverse

> because there was not probable cause to support the warrant's issuance, and remand with instructions to the district court to conduct a hearing to determine whether Namer's conviction should be affirmed on grounds of harmless error, inevitable discovery, independent source or attenuation. Id. at 1090 (footnote omitted).

The indictment in this case involved charges relating to two advance fee loan transactions by the defendant Namer. One involved the Astrobowl, whose principal was Mr. Louis LaDuke. The other involved Gilmar Marine, whose principals were Raymond Smeago and Tony Fiasco. At trial, evidence was presented concerning a third transaction involving Tropical Sales, whose principals were Richard Gazie and Terry Ziegler. The evidence at trial showed that these schemes involved loan commitments to be issued in the name of Sinton Service Corporation through Jerry Simmons. Evidence at trial showed

Sinton Service Corporation was insolvent and could not fund these commitments.

Pursuant to the remand several hearings were held in this matter between September 3, 1986 and September 18, 1986 on the issues of harmless error, inevitable discovery, independent source and attenuation. In addition, this court has considered the record of the prior trial in this matter. Both parties also filed memoranda. The defense on page 4 of its memorandum identifies the items and testimony introduced at trial which it argues were tainted by the illegal search. These are "(a) The Gazie-Ziegler (Tropic Sales) loan commitment from SCC and (b) The testimony of the witnesses Gazie and Ziegler and (c) The Simmons to Namer letter of August 25, 1977, Exhibit B16 and B26 in the LaDuke file." Because I find that each of these items falls within the

doctrines of harmless error, independent source, inevitable discovery or attenuation, I find that there is no basis for retrial of the defendant and that his prior conviction must stand.

The evidence at the hearings showed that prior to November 3, 1977, the New Orleans District Attorney's office had received several complaints regarding the payment of advance fees for loans to David Namer. On November 3, 1977, a search warrant was issued for Namer's records. Included in the items seized were a file on the LaDuke (Astrobowl) transaction and loan commitments for Tropic Sales and Gilmar Marine.

In late 1977, FBI Agent Roland Powell received information from a confidential informant, Kim Peterson, that Namer was involved in issuing fraudulent Sinton Service loan commitments. Unrelated to Peterson,

Agent Powell received information from U.S. Magistrate James Carriere that a civil suit before him involving a loan commitment issued by Namer appeared to be an advance fee scheme. A federal case was opened and a grand jury subpoena was issued on February 27, 1978 for all records in the possession of the District Attorney's office relevant to Namer. Pursuant to this subpoena, the investigative files on the complaints received prior to the search warrant and those items seized in the search and still in the possession of the District Attorney's Office were turned over.[1]

Prior to the search warrant being issued the Houston FBI office was conducting a totally independent investigation into Sinton Service Corporation and Jerry Simmons

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[1]Some of the items had been previously returned by the District Attorney's office to Namer. Where copies had been retained these were also provided.

which lead to discovery of a Sinton loan commitment to Gilmar Marine.

Mr. LaDuke (Astrobowl) and his attorneys Jerry Brown and Justin Ourso and Anthony Fiasco (Gilmar Marine) and his attorney John Ryba all complained to authorities independently of any search and voluntarily cooperated with government officials, providing documentation and testifying at trial. Among the documents LaDuke provided the U.S. Attorney and the FBI was a letter showing Mr. Namer's bank. On the day of LaDuke's interview, a grand jury subpoena was issued for Namer's bank records.

FBI Agent Powell sent a lead to locate Tropic Sales based upon a deposit item in the bank records obtained through this subpoena. When FBI Special Agent Witkowsky initially interviewed Gazie and Ziegler, (Tropic Sales) he had no knowledge of the

search. His report of interview shows that they gave details of the transaction with Namer and provided documentation which included the Gazie-Ziegler (Tropic Sales) loan commitment. Ziegler testified at the hearing that he voluntarily testified at trial as to the details of the transaction and had no knowledge of the search.

The Gazie-Ziegler (Tropic Sales) loan commitment introduced at trial came from the victims. The only items admitted into evidence which came directly from the search were those documents contained in Government Exhibit B, Mr. Namer's file relative to the LaDuke transaction. The vast majority of these were duplicates of documents from the victim's files either introduced into evidence or available in those files voluntarily provided by the victim, LaDuke. For the purpose at hand, the Court finds that

only Exhibits B16 and B26 are not exactly duplicated or totally irrelevant to the matter before this Court.

HARMLESS ERROR:

This Court finds that the introduction of B16 and B26 was harmless beyond a reasonable doubt. The sole possible relevance of these letters to the prosecution was the identification of Jerry Simmons and Sinton Service Corporation as the source of the loan guarantee offered by Namer to LaDuke. I find essentially the same information was contained in the notations on the bank records obtained by grand jury subpoena from the First National Bank of Commerce and the First National Bank of Euless which were admitted into evidence at trial as Government Exhibits 98 and 101. Where the evidence sought to be suppressed is duplicative of other evidence in the record, it must be

considered harmless beyond a reasonable doubt. United States v. Parker, 722 F.2d 179, 184 (5th Cir. 1983); United States v. Miller, 666 F.2d 991, 995 n. 2 (5th Cir.), cert. denied, 456 U.S. 964 (1982). I also find this was not the only evidence duplicative of B16 and B26. B26 was also duplicative in part by the loan commitment to Gilmar Marine obtained from that victim and introduced into evidence.

Jerry Simmons, a co-conspirator who pled guilty to charges in Texas and Louisiana, also testified as to the Sinton Service connection. Louis Koerner, the only defense witness, also testified to the existence of a letter from Sinton Service in trying to lay the foundation for a defense of good faith.

The defense has also argued that retrial is necessary because the Gazie-

Ziegler (Tropic Sales) loan commitment obtained from the victims and the testimony of Gazie and Ziegler constituted fruit of the poisonous tree. Because I find the doctrines of independent source, inevitable discovery and attenuation apply, I find no such taint as to this evidence.

INDEPENDENT SOURCE:

I find the following evidence to have been obtained from sources independent of any taint:

(a) All testimony and documentation relating to Gilmar Marine which I find to be the product of the voluntary complaint by Ryba to the Federal Bureau of Investigation in Pittsburgh. In the alternative, I find this evidence to also be the product of the Texas investigation by Special Agent Aiken commenced prior to the search since I find Aiken sent the lead to interview William Clay

of Gilmar Marine without knowledge of the search by State authorities. A trace of the Gilmar Marine payment to Namer would inevitably lead to the bank account at the First National Bank of Commerce. (b) All evidence of the condition of Sinton Service Corporation was the product of the Texas investigation. There was never any contention that the records seized from Namer showed the true financial condition of Sinton Service Corporation. (c) I find that all the information and documentation provided by LaDuke and his attorneys were the product of his complaint to the District Attorney's office prior to the search and subsequent interview by government agent and attorney. In the alternative it also comes under the doctrines of inevitable discovery and attenuation. (d) I find that knowledge of the involvement of Jerry Simmons with Namer was developed by the ongo-

ing independent Texas investigation prior to Special Agent Aiken's knowledge of search warrant in Louisiana. I also find this link was established by the Gilmar Marine records provided by Ryba at the time he complained to the Pittsburgh FBI. (e) I find the bank records of Namer obtained by grand jury subpoena from the First National Bank of Commerce to be derived from an independent source. Prior to the search, the District Attorney's office had received several complaints about Namer, one of which came from Jerry Brown, the attorney for Louis LaDuke. The District Attorney's office was also in possession of a cancelled check showing that funds Namer received from at least one victim had been deposited in the First National Bank of Commerce. The same subpoena which gave the search records to the federal authorities also provided these files

of complaints, including that of LaDuke. On the date the subpoena was issued, LaDuke had provided the government with the names of Namer's bank and his banker. Based on the testimony of ex-Assistant United States Attorney Chen, I find that it is normal procedure in cases such as this to trace the money provided to Namer by his victims and to subpoena Namer's bank records, as part of this trace. I therefore find the subpoena of Namer's bank records to be the direct result of LaDuke's voluntary interview with AUSA Chen and Agent Powell

INEVITABLE DISCOVERY:

Tropic Sales: The only serious argument made by the defense concerning fruit of the poisonous tree was made in relation to the discovery of Gazie and Ziegler. The evidence shows that the Tropic Sales loan commitment was first discovered among the

records seized from Namer. However, I find that discovery of Tropic Sales to be inevitable even without the search.

Prior to the search, the District Attorney's office knew the identity of several victims including LaDuke, who had given money to Namer. These files were obtained by Federal authorities at the same time as the search records. As stated previously, the obtaining of bank records to trace the funds received from victims is a normal investigative step in cases such as this. I find these District Attorney files naming victims and the independent Texas investigation which lead to the identification of Gilmar Marine as a victim constitute leads in the possession of the government which by virtue of ordinary investigation would inevitably lead Federal authorities to subpoena Namer's bank records and thereby

discovery the deposit bearing the notation "Sinton SVC Corporation Commitment Fee for Tropic Sales & Development Corporation." United States v. Brookins, 614 F.2d 1037, 1038 (5th Cir. 1980). I further find that the testimony of Special Agent Powell, and comparison of the bank records with the lead sent to locate Tropic Sales, establish the bank records as the source of the lead to locate Tropic Sales.

Mr. LaDuke voluntarily cooperated with the government and without regard to the search provided them documentation regarding the transaction. This interview with Federal officials occurred on March 9, 1978. At that time LaDuke produced a letter showing Namer's bank to be the First National Bank of Commerce. On the same date, March 9, 1978, a subpoena was issued to First National Bank of Commerce for Namer's account records. This

subpoena specifically requested records of the transactions which had been the subject of complaints to the District Attorney's office prior to the search involving LaDuke. I find this interview which caused the issuance of the bank subpoena to be an intervening and independent event sufficient to support a finding of inevitable discovery under United States v. Miller, 666 F.2d 991, 997 (5th Cir.), cert. denied, 456 U.S. 964 (1982).

ATTENUATION:

The specific objection made by the defense with regard to fruit of the poisonous tree concerns the testimony and loan commitment related to the Tropic Sales transaction. The evidence at the hearing shows that when the witnesses Gazie and Ziegler were first approached by FBI Agent Witkowsky, Witkowsky had no knowledge of a search in New Orleans.

At that time, the victims, who also had no knowledge of the search, voluntarily provided the agent with a detailed account of the transaction and numerous documents including the Tropic Sales loan commitment which was later introduced in evidence. Terry Ziegler testified at the hearing that he remembered nothing about a search and that his testimony at trial was voluntarily [sic].

I find that the testimony and production of the Tropic Sales loan commitment by Gazie and Ziegler were completely voluntary. The items from the search were not used in the questioning of these individuals. Accordingly, this Court finds that their testimony and the introduction of their loan commitment was sufficiently attenuated as to remove any possible taint arising from the search. United States v. Miller, 666 F.2d 991, 995

(5th Cir.), cert. denied, 456 U.S. 964 (1982).

I also find that the testimony of Jerry Simmons, the co-conspirator who was called as a court witness and provided testimony duplicative of Government exhibits B16 and B26, was sufficiently attenuated so as to remove any taint. Simmons testified following plea bargains in both Texas and Louisiana. I note that the plea bargain in Texas was the result of a separate investigation being conducted by Special Agent Aiken, which investigation independently established a link between Namer and Simmons. I find the link between the search and his testmiony to be much less than that established in United States v. Houltin, 566 F.2d 1027, 1031-32 (5th Cir.), cert. denied, 439 U.S. 826 (1978). In a prior decision, the Fifth Circuit had overturned the conviction of the defendant

Houltin based on an illegal wiretap but nevertheless affirmed the conviction of co-defendants who had no standing to contest the interception. United States v. Houltin, 525 F.2d 943, 952 (5th Cir. 1976), cert. denied, 939 U.S. 826 (1978). On retrial, the government used the compelled testimony of these convicted co-defendants against Houltin. The court nevertheless held that the compelled testimony of these co-defendant, convicted on the strength of the illegally seized evidence, was sufficiently attenuated so as to remove any taint. A plea bargain is a separate act of volition which attenuates the taint of an illegal search and seizure. United States v. Stevens, 612 F.2d 1226, 1229 (10th Cir. 1979), cert. denied, 447 U.S. 921 (1980).

Defense witness Louis Koerner also testified that Sinton Service was to provide

the loan commitment to LaDuke. This testimony duplicates that of Simmons and Government Exhibits 98 and 101 derived from bank records as well as B16. I do not find that this testimony was the product of a witness called for the purpose of showing that the representations regarding possible issuance of a loan commitment by Sinton Service formed a good faith basis for Namer's efforts to obtain an advance fee.

CONCLUSION

This Court finds that the evidence at issue admitted in the trial of David Namer falls within the doctrines of harmless error, inevitable discovery, independent discovery or attenuation. Accordingly, this Court concludes that retrial is not appropriate and that the conviction of the defendant David Namer remains in effect.

New Orleans, Louisiana, February 10, 1987.

Marcel Livaudais, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 80-3611

UNITED STATES OF AMERICA,

Plaintiff-Appellee

VERSUS

DAVID ISRAEL NAMER,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 22, 1982)

(Rehearing Denied August 25, 1982)

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

CLARK, Chief Judge:

David Israel Namer was convicted of various federal crimes arising out of a fraudulent loan brokerage scheme. The prosecution secured evidence used at his trial as a result of a search and seizure of

Namer's complete office records conducted by Louisiana officials pursuant to a broad search warrant issued by a Louisiana magistrate. The district court denied Namer's motion to suppress evidence seized during and derived from the search. On appeal, Namer argues that the warrant was invalid under the probable cause and particularity clauses of the fourth amendment.[1] We reverse because there was not probable cause to support the warrant's issuance, and remand with instructions to the district court to conduct a hearing to

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[1]The fourth amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

determine whether Namer's conviction should be affirmed on grounds of harmless error, inevitable discovery, independent source, or attenuation.

I

Pauline Hardin, then an Assistant District Attorney in Orleans Parish, Louisiana, took charge of an investigation into the business affairs of David Namer in late 1976 or early 1977. Hardin and her coinvestigators, Assistant District Attorney Robert Barnard and New Orleans Police Officer James Dall, were members of the Economic Crime Unit of the Orleans Parish District Attorney's office. Namer and his company, National Financial Management Services, Inc., served in a general financial advisory capacity and, in particular, acted as loan brokers and assisted businesses and individuals, most of whom were engaged in the

construction business, in obtaining loan commitments.

During the course of their investigation, Hardin and members of her team contacted Harry Stansbury, Deputy Commissioner of Securities for the State of Louisiana, to ascertain whether the loan commitments and loan commitment applications in which Namer was dealing were securities within the meaning of the Louisiana Blue Sky Law, La.Rev.Stat.Ann §§51:701-720 (West 1965 & West Supp. 1982). Stansbury opined in conversations with the investigation team that the loan instruments probably were securities within the meaning of the law, that they had not been registered with the Commission, and that Namer was not registered as a broker-dealer with the Commission. Based on Stansbury's opinion and on information from other sources that Namer was

dealing in loan commitments, the investigation team applied for a warrant to search Namer's office.

The search warrant application,[2] signed by Officer Dall and drafted by Hardin and Barnard, explained generally the course of the investigation, described specifically the transactions one named individual had with Namer, and placed at least one loan commitment on the premises of Namer's offices. Furthermore, the application stated

> that Harry Stansbury, Deputy Commissioner of Louisiana Securities Commission[,] has advised the Orleans Parish District Attorney's Office that the offerings being made... are classified as securities...[,] that these offerings are not registered with them and that David Namer is not a licensed broker-dealer as required by law.

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[2]The search warrant application's statement of "reasons and facts for the request[ed]" search warrant is reproduced as Appendix A to this opinion. Infra, p. 1098.

In the application, Namer's conduct in selling or offering to sell unregistered securities is alleged to be violative of two provisions of the Louisiana Blue Sky Law. The two provisions make it unlawful to sell unregistered securities, La.Rev.Stat.Ann. §51:706(A),[3] and unlawful to sell securities without registering as a broker-dealer with the Securities Commission.[4]

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[3]La.Rev.Stat.Ann §51:706(A) provides, in part, that "[n]o securities, except of a class exempt under any of the provisions of R.S. 51:704 or unless sold in any transaction exempt under any of the provisions of R.S. 51:705, shall be sold within this state unless such securities have been registered by notification or by qualification." The term "security" is defined by id. §51:701(1). See infra note 13.

[4]La.Rev.Stat.Ann §51:710(A) provides that "[n]o person shall engage in business in this state as a broker-dealer or agent-salesman unless he has been registered as a broker-dealer or agent-salesman in the office of the commissioner pursuant to the provisions of

(Footnote cont'd on next page.)

Based on the search warrant application, the magistrate issued a search warrant. The warrant authorized a sweeping search of Namer's offices for a wide variety of business papers.[5] Officer Dall and others executed the search warrant on the afternoon of its issuance. They seized and carried away all of the current working files, assorted correspondence, bank and financial statements, and various other items. The record does not indicate that any criminal action has been brought by the Orleans Parish District Attorney's office predicated on the alleged Blue Sky Law violations cited as justifying the search warrant.

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this section." A "broker-dealer," one generally engaged in buying or selling securities, is fully defined by id. §51:701(4).

[5]The provision of the search warrant enumerating the items to be seized is reproduced as Appendix B to this opinion. Infra, p. 1099.

Pauline Hardin, the Assistant District Attorney who led the Economic Crime Unit's investigation of Namer, joined the federal government as an Assistant United States Attorney for the Eastern District of Louisiana shortly after the search. Within three months, a federal grand jury issued a subpoena to the state district attorney's office for the documents seized in the state search. Subsequently, Namer and two others were indicted by a federal grand jury and charged with conspiracy, wire fraud, and inducing persons to travel in interstate commerce for a fraudulent purpose.[6] Pauline Hardin, among others, signed the indictment.

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[6]Namer was indicted under the aiding and abetting, 18 U.S.C. §2, wire fraud, id. §§1341 & 1343, and inducement of interstate travel to execute a fraud, id. §2314, provisions of the United States Code.

The indictment, in essence, alleged that Namer acted criminally in three separate transactions which can most succinctly and accurately be denoted loan brokerage scams. In those transactions, Namer allegedly secured loan commitments for three clients from an insolvent lending institution. Namer, in concert with his brother and an officer of the lending institution, allegedly knew the loan commitments were worthless when he procured them and extracted brokerage fees.

Namer pled not guilty to each count of the indictment and filed a motion to suppress the evidence seized during and derived from the 1977 state search of his offices. After a hearing, the motion to suppress was denied. A jury found Namer guilty on four counts of the indictment. After the grant of a new trial on a ground

unrelated to the present proceeding, Namer was again convicted on the same four counts.

Namer appeals the denial of his suppression motion. He also argues that collateral estoppel should have barred presentation of certain evidence at his second trial. We need reach only the first issue presented on appeal. Because there was not probable cause to support the issuance of the search warrant pursuant to which Namer's office was searched we reverse.

II

Namer's challenge to the Louisiana warrant pursuant to which his office was searched relies on both the probable cause and particularity clauses of the fourth amendment. At the outset, we note that the most striking aspects of the warrant are that it was premised on alleged criminal violations under a novel legal theory and

that it authorized a search and seizure of virtually all of Namer's papers. As the First Circuit has cautioned, since the demise of the mere evidence rule[7] and the removal of business records from the self-incrimination protections of the fifth amendment,[8] the particularity and probable cause commands of the fourth amendment are "the only protection a citizen now has against a general search of his private papers." United States v. Abrams, 615 F.2d 541, 547 (1st Cir. 1980). While we do not suggest that the papers of white-collar criminal suspects are entitled to greater fourth amendment protection than the guns and

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[7]See Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

[8]See Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); Couch v. United States, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973).

knives of violent street criminals, we do not deny that the application of fourth amendment principles to the ferreting out of white-collar criminal conduct often requires a unique approach by investigating officers. Today's case, in which we hold that there was not probable cause to support the Louisiana warrant, graphically illustrates this point.

A

After conducting an approximately year-long investigation into Namer's business affairs, Assistant District Attorney Hardin and her colleagues settled on the theory that Namer had violated the Louisiana Blue Sky Law by failing to register the loan commitments as securities and by failing to register as a broker-dealer with the Securities Commission.

That theory can be characterized, at best, as novel, and, at worst, as frivolous.[9]

In applying for a search warrant, however, the District Attorney's office camouflaged the novelty of the legal theory under which it was proceeding. The affidavit stated that Deputy Commissioner Stansbury had advised the Economic Crime Unit that the offerings being made by Namer "are classified as securities." Confronted with the statement that the offerings were "classified as securities," the magistrate was justified in concluding that there was probable cause to believe that a crime had been committed. However, the truth of the matter is that the Securities Commission had no formal procedure for classifying offerings as securities and

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[9]Perhaps the most telling evidence of the lack of merit of the theory is that the Orleans Parish District Attorney's Office, even with its "proof" firmly in hand, never brought criminal charges against Namer premised on Blue Sky Law violations.

that Stansbury gave the District Attorney's Office only a qualified opinion that the instruments in which Namer was dealing were securities. Our task is to determine whether the misrepresentation of the status of the offerings is material and reckless under the standards of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). A conclusion that it is requires consideration of whether the remainder of the search warrant application alone would provide probable cause to believe that a crime had been committed.

B

[1] The Supreme Court's decision in Franks v. Delaware, supra, outlines the consequences flowing from a misrepresentation

in a search warrant application.[10] The Court there held that if

> a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, ..., [and that if], with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56, 98 S.Ct. at 2676, 57 L.Ed.2d at 672. Put another way, if a search warrant affidavit contains a material misstatement made intentionally or with reckless disregard

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[10]The Franks opinion also dealt with the issue of when a hearing must be held after a challenge to the veracity of a search warrant affidavit has been made. We do not face the issue of whether a hearing was required since Namer was allowed to present evidence on the issue at the suppression hearing. See United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980).

for the truth, the court should excise the offensive language from the affidavit and determine whether the remaining portion establishes probable cause.

[2] We have no difficulty determining that the search warrant application stating that Stansbury had told the Economic Crime Unit that the offerings were "classified as securities" is a misstatement and a material one at that. During the suppression hearing, Namer's attorney questioned Stansbury on the matter of his actual representations to the Economic Crime Unit. Those exchanges went as follows:

> Q. Did you ever tell the Office of the District Attorney for the parish of New Orleans that the transactions... were actually classified as securities? And I want you to be very specific about that....
>
> A. I think I understand your question.... I did specifically say that the

elements of the securities transaction, you know, were present; and it probably was securities. A lot of that, of course, was my opinion at the time.

* * *

Q. Is there a classification process? Does Louisiana Securities Commission engage in a classification process?

A. There is no specific process for determining whether or not something is a security.

* * *

Q. Did you ever tell the District Attorney's Office that Mr. Namer's transactions were classified as securities?

A. I think I told them that I felt it was, the documents could be securities.

* * *

Q. Did you yourself ever tell, in your official capacity as director of Louisiana Securities Commission, Mr. Namer's transactions were classified as securities?

> A. I can't recall. I think I told them that I felt it was securities. A lot of it was opinion. Our office had not had a lot of contact with this particular element at that time, this type of securities transaction.

Stansbury's admission that the Commission has no formal classification procedure and his inability to claim that he gave the District Attorney's Office any more than a qualified opinion that the offerings were securities lead us to conclude that the affidavit misstated his representations.[11]

The Supreme Court has noted that:

> affidavits for search warrants... must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation.... [T]he courts should not invalidate the warrant by

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[11] Cf. United States v. Marcello, 508 F.Supp. 586, 605 (E.D.La. 1981)(representations inaccurate in isolation did not mislead magistrate because they were accurate when placed in context).

> interpreting the affidavit in a hypertechnical, rather than commonsense, manner.

United States v. Ventresca, 380 U.S. 102, 108-09, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). In the case before us, the affidavit was drafted by two attorneys during the course of a lengthy investigation at a time when they were not beset by any exigent circumstances. The word "classified" connotes the authoritative result of ordered procedures and methodologies, not an ad hoc and qualified oral opinion of a single agency employee. The affidavit's statement is no less a misrepresentation because it manipulates the facts subtly. By using the word "classified," the affiant inaccurately described what had transpired. Since the statement that the instruments were "classified as securities" was the only item in the affidavit tending to establish that

Namer had acted criminally, we also conclude that the misrepresentation was material. The more difficult issue is whether Namer has established by a preponderance of the evidence that the misrepresentation was made intentionally or with reckless disregard for the truth.

Franks and its lower court progency offer little guidance to us in determining whether a misrepresentation has been made intentionally or with reckless disregard for the truth, on the one hand, or negligently, on the other. In United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980), this court was faced with an omission from, as opposed to a misrepresentation in, an affidavit. The panel recognized that this circuit treats omissions essentially the same as misstatements. Id. More pertinent to our inquiry, the court noted that "[i]t is

possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself." Id. at 329. This recognition that the analytical concepts of materiality and recklessness are often bound together is significant in this case. The misrepresentation was a crucially material one. From that finding of vital materiality and other circumstances surrounding the investigtion, we conclude that the misrepresentation was made, at the least, with reckless disregard for the truth.

[3] The search warrant application was drafted by three members of the Economic Crime Unit of the Orleans Parish District Attorney's Office after a year-long investigation into Namer's business affairs. The two principal draftsmen were attorneys

with at least some exposure to the legal and factual intricacies often involved in detecting and prosecuting white-collar crime. It is not shown that they acted in a hurried fashion. Rather, we presume from the pace of the investigation and the frequency of their conversations with Stansbury that they acted deliberately and that they were aware of the novelty of their legal theory. We also note that a strong opinion from Stansbury was the best, if not only, hope for conferring an aura of legitimacy on their legal theory. Given all of the above -- lengthy investigation, draftsmen trained in the law with experience in white-collar criminal prosecution, lack of exigency, novel legal theory, appreciation of the importance of Stansbury's opinion, and understanding of the informal process by which Stansbury reached and rendered his opinion -- we conclude that

the members of the Economic Crime Unit proceeded in reckless disregard of the truth when they characterized Stansbury's ad hoc, oral opinion as a "classification." The circumstances surrounding the investigation and warrant application permit no other reasonable conclusion. Were we to construe the warrant application as having used the words "classified as securities" merely to refer to the expression of an ad hoc informal oral opinion, we would conclude, for the reasons stated in II C below, that the application was an insufficient basis on which to rest a determination of probable cause.

C

Our conclusion that the affidavit's characterization of Stansbury's views was a reckless and material misrepresentation requires us to purge the affidavit by

excising the misrepresentation and then to determine whether the purged affidavit would be sufficient to support a probable cause finding. See United States v. Farese, 612 F.2d 1376, 1377 (5th Cir.), cert. denied, 447 U.S. 925, 100 S.Ct. 3019, 65 L.Ed.2d 1118 (1980).

[4,5] In a search warrant case, the magistrate must have probable cause to believe that certain items evidence criminal activity and that those items are presently located at a certain place. The concern in the case at hand is whether the magistrate, reviewing the purged affidavit, would have probable cause to believe that Namer's loan

transactions constituted criminal activity.[12]

On the issue of probable cause to believe a crime has been committed, the Supreme Court has stated:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." And this "means less than evidence which would justify condemnation" or conviction. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

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[12]In considering whether a purged affidavit establishes probable cause, we are proceeding somewhat hypothetically. Since the Louisiana magistrate never considered the purged affidavit, the normal presumption of validity attaching to a magistrate's probable cause finding does not apply. See 2 W. LaFave, Search and Seizure §4.4, at 68 (1978).

Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed. 1879, 1890 (1949)(citations omitted). Our examination of the purged affidavit leads us to conclude that the evidence presented there is insufficient to give reasonable grounds for a belief that Namer was engaged in criminal activity.

Purged of the improper passage, the only non-conclusory averment that Namer was selling securities is the statement by an ex-client of Namer that he paid an advance fee to Namer on a loan commitment application and that the saw an approved loan commitment in Namer's office. Thus, the purged affidavit reveals at best that Namer dealt in loan commitments in two instances. Since the crimes that the affidavit states were committed by Namer require the sale of securities, a common-sense reading of the

affidavit discloses that the loan commitments are the securities in question. The probable cause issue is this: Whether a magistrate would be justified in concluding that the sale of loan commitments violates the Louisiana Blue Sky Law. Without the guidance of an official classification, or the equivalent, by the Deputy Blue Sky Commissioner, the magistrate would be obliged independently to draw a conclusion on the issue.

[6] We hold that a magistrate presented with the purged affidavit would not have probable cause to believe that Namer was engaged in criminal activity. This is so because the District Attorney's novel legal theory that the loan commitments were securities under the Louisiana Blue Sky Law is simply untenable and because the purged affidavit fails to provide an adequate

explanation and description of the allegedly illegal transactions. In discussing the status of the loan commitments as securities, we review the jurisprudence on the issue extant when the magistrate would have been presented with the purged affidavit.

We first turn to cases interpreting the definition of "security" appearing in the federal securities law, and then discuss a unique aspect of the Louisiana Blue Sky Law. The definition of a security in the Louisiana Blue Sky Law[13] was patterned after and very

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[13]La.Rev.Stat.Ann. §51:701(1) provides that:

> "Security" shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, warehouse receipt, certificate of interest or participation, or the right to subscribe to any of the foregoing, certificates of interest in a profit sharing agreement, certificate of deposit for a security, collateral trust

(Footnote cont'd on next page.)

nearly duplicates the federal securities law definition of a security.[14] See Caldwell v. Trans-Gulf Petroleum Corp., 322 So.2d 171,

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> certificate, pre-organization certificate, pre-organization subscription, voting trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings, or in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim bond, debenture, note, certificate, or receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract fixed or variable, which is authorized to be written pursuant to Title 22 of the Louisiana Revised Statutes of 1950, as amended.

[14]Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1), provides:

> When used in this subchapter, unless the context otherwise requires --

(Footnote cont'd on next page.)

174-75 (La. 1975). Considering the dearth of reported cases construing the Louisiana Blue Sky Law definition of a security, see Lyman, Securities Regulation in Louisiana -- A Practical Introduction to the Blue Sky Law,

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> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any certificate or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The definition of security in the Securities Exchange Act of 1934, 15 U.S.C. §78c(1)(10), is essentially the same. See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 847 n. 12, 95 S.Ct. 2051, 2058 n. 12, 44 L.Ed.2d 621 (1975).

16 La.B.J. 327, 328 n. 3 (1969), we turn to cases interpreting the federal securities law definition of a security.

Few decisions address the issue of whether a loan commitment is a security. The Tenth Circuit looked at the facts and circumstances surrounding the purchase of a loan commitment by a real estate developer and concluded that it was not a security. McGovern Plaza Joint Venture v. First of Denver Mortgage Investors, 562 F.2d 645, 647 (10th Cir. 1977). The court in McGovern first noted that the phrase "loan commitment" is not mentioned in either of the federal statutory definitions.[15] Id. at 646. The court then turned to the catch-all statutory phrase "investment contract" and determined that the transaction at issue was purely commercial in character and not an investment.

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[15]Nor is it mentioned in La.Rev.Stat.Ann §51:701(1). See supra note 13.

Id. at 647. From this, the court concluded that the loan commitment transaction did not involve a security. Id. at 648.[16]

In Lee v. Navarro Savings Association, 416 F.Supp. 1186 (N.D.Tex. 1976), rev'd on other grounds, 597 F.2d 421 (5th Cir. 1979), aff'd, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980), a court in this circuit heard a claim for damages arising from the breach of a loan commitment agreement. The court held that the defendant's loan commitment letter was not a security under the federal securities law. Id. at 1190-91. The court in Navarro Savings cited Bellah v. First National Bank of Hereford, 495 F.2d 1109 (5th Cir. 1974). In Bellah, 495 F.2d at 1112-13, and McClure v.

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[16]The Tenth Circuit's decision in McGovern substantially narrowed that court's earlier decision in United States v. Austin, 462 F.2d 724 (10th Cir.), cert. denied, 409 U.S. 1048, 93 S.Ct. 518, 34 L.Ed.2d 501 (1972).

First National Bank of Lubbock, 497 F.2d 490, 494-95 (5th Cir. 1976), cert. denied, 420 U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402 (1975), this circuit adopted the commercial/investment dichotomy to determine whether a loan transaction is a security.

[7] We fail to see how Namer's transactions could be characterized as investment-oriented under the Bellah-McClure test. Namer's clients came to him with the intention of structuring commercial deals, namely, to arrange the financing of construction projects. They came, not with the expectation of profits, see United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852-59, 95 S.Ct. 2051, 2060-63, 44 L.Ed.2d 621 (1975), but with hopes of obtaining fixed loan commitments. Such a transaction is not within the ambit of the federal securities law definition of a

security. As this court has stated before, "[w]e doubt that Congress intended by [the securities law] to render federal judges the guardians of all beguiled makers or payees." Bellah, 495 F.2d at 1114. Had the Louisiana magistrate been presented with the purged affidavit, he would have found no comfort in the federal jurisprudence for a determination that Namer was engaged in criminal activity.

Likewise, the Louisiana Blue Sky Law undermines the possibility of a probable cause determination. Aside from the fact that a Louisiana magistrate would interpret the language of the Blue Sky Law definition of a security not to include a loan commitment, there is also significant support in the legislative background of the Blue Sky Law for the proposition that the legislature did not intend loan brokers to be covered by that law. In 1969, loan brokers were placed

under the comprehensive regulatory authority of the Louisiana Securities Commission. See 1969 La.Acts 61 & 66. The 1969 Blue Sky Law amendments required loan brokers to register with the Commission, set registration fees, and instructed the Commissioner to prescribe a written examination and minimum acceptance standards for loan brokers. 1969 La. Acts 66. A "loan broker" was defined as "any person who... acts as a go-between, finder or agent of a lender or borrower of money for the purpose of procuring a loan of money." 1969 La. Acts 61. Without explanation, the legislature deleted the provisions relating to loan brokers from the Blue Sky Law in 1974. See 1974 La. Acts 493; Louisiana Legislative Council, Acts, Resolutions and Vetoed Bills, La.Legis., 37th Reg. Sess. Resume at 140-41 (1974). In the pre-1974 Blue Sky Law, the definitions section separately defined

"broker-dealer" and "loan broker." In the amended version, the statutory definition of loan broker was deleted and that of broker-dealer left intact. The legislature's action in removing loan brokers from the regulatory jurisdiction of the Louisiana Securities Commission renders it highly doubtful that they remain implicitly covered by the general provisions of the Blue Sky Law.[17]

To summarize, we find two compelling reasons to conclude that, under the purged affidavit, there was no probable cause to believe that Namer had engaged in criminal activity. First, the cases analyzing the issue of whether a loan commitment is a security have held that it is not, and the peculiar legislative history of the Louisiana

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[17]One Louisiana court has noted the absence of a similarity between loan commitments and securities. See Talbot v. Jones, 288 So.2d 80, 83 (La.App. 1974).

Blue Sky Law evidences a legislative intent that loan brokerage activities not be covered by that law. The purged affidavit offered the bald assertion that Namer's loan brokerage activities violated provisions of the Blue Sky Law. That assertion was as specious in 1977 as it is today.[18]

[8] Furthermore, even if the status of loan commitments as securities had been a closer question, the purged affidavit would have given the magistrate insufficient information about the nature of the loan commitment transactions to make an

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[18]At least two civil actions have been brought against Namer alleging securities law violations. One district court, relying on McGovern, dismissed on the ground that the loan commitment transaction in question did not involve securities under federal, Illinois, or Louisiana law. North American Int'l Dev. Ltd. v. Allied Consultants, Inc., No. 77-C-3593, slip op. at 5-6 (N.D.Ill. Jan. 31, 1979). The other court dismissed without issuing an opinion. O'Riley Bros. Constr. Co. v. Namer, No. 78-3900 (E.D.La. Apr. 4, 1979).

independent judgment on the existence of probable cause. See Whitely v. Warden, 401 U.S. 560, 564, 91 S.Ct. 1031, 1035, 28 L.Ed.2d 306 (1971). The determination that a transaction involves securities is particularly dependent on the facts and circumstances of the transaction. The purged affidavit does not supply any details with respect to Namer's loan commitment transactions, and hence, could not support a probable cause determination.[19]

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[19]Had the facts and circumstances of Namer's loan commitment transactions been spelled out in the purged affidavit and had the law less clearly established that loan commitments are not securities, a finding of probable cause might have been justified. Nothing in this opinion should be construed to require a warrant-issuing magistrate to engage in subtle legal analysis before finding probable cause. That is not the magistrate's role and that usually is not necessary to a finding of probable cause. Cf. Adams v. Williams, 407 U.S. 143, 149, 92 S.Ct. 1921, 1924-25, 32 L.Ed.2d 612 (1972).

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[9] The final disposition of this case is not reached by the conclusion that there was no probable cause to issue the search warrant. The government argues that, even if the serach warrant was invalid, the doctrines of inevitable discovery, independent source, attenuation, and harmless error requires that Namer's conviction be affirmed. Since the district court denied Namer's motion to suppress, no hearing was held on these issues and no factual findings were made. Thus, the record before us is inadequate as a basis for determining whether any of these harmless error doctrines require that Namer's conviction be affirmed. Hence, we remand this case to the district court for appropriate findings and conclusions on whether these doctrines apply or whether Namer must be retried.

III

We hold today only that the search warrant application presented to the Louisiana magistrate, when purged of material, reckless misrepresentations, would not provide probable cause to believe that Namer had violated the law.[20] Accordingly, we reverse and remand to the district court with directions to conduct further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX A

The search warrant application, signed by James Dall of the New Orleans Department of Police, contained the following

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[20]Due to our disposition on this ground, we do not have occasion to decide whether the warrant also offends the particularity clause of the fourth amendment. Likewise, we defer consideration of Namer's collateral estoppel claim.

statement of "reasons and facts for the request[ed]" search warrant:

> An investigation by Assistant District Attorney Pauline Hardin, Assistant District Attorney Robert Barnard, and New Orleans Police Department Officer James Dall of the Economic Crime Unit of the Orleans Parish District Attorney's Office reveal that National Financial Management Services, Inc., d/b/a Financial Management Services and David Namer, did engage in the selling of and offer to sell unregistered securities to various persons in Orleans Parish, Louisiana, in willful violation of Louisiana Revised Statute 51:706(A) and Louisiana Revised Statute 51:710, and that in the course of this investigation one Mitchell Heller, a client or customer of National Financial Management Services, Inc., d/b/a Financial Management Services and David Namer, has informed the Orleans Parish District Attorney's Office that he gave twenty-five thousand dollars ($25,000) by check to David Namer on or in the premises described above in Orleans Parish, Louisiana, on September 12, 1977, as an advanced fee on an application for a loan commitment as requested by David Namer and that Mitchell Heller was in the same offices of David

Namer, National Financial Management Services, Inc., d/b/a Financial Management Services, at noon on October 27, 1977, at which time he did personally observe some of the above described property including an approved loan commitment on or in these premises in the custody and possession of David Namer, and that Harry Stansbury, Deputy Commissioner of Louisiana Securities Commission has advised the Orleans Parish District Attorney's Office that the offerings being made by National Financial Management Services, Inc., d/b/a Financial Management Services and David Namer, including the transactions with Mitchell Heller, are classified as securities and the official records of the Louisiana Securities Commission reveal that these offerings are not registered with them and that David Namer is not a licensed broker-dealer as required by law.

APPENDIX B

The search warrant issued by the magistrate authorized a search of Namer's offices for:

> All loan commitment applications, loan commitments, corporate records, records of corporate

minutes, stock register books, stock certificates, bank records of corporation and David Namer personally, telephone company statements for period September 1, 1976 to November 3, 1977, financial records of any audits, all correspondence to or from any clients, customers and investors or any prospective clients, customers and investors, records of any escrow accounts, all of the above of National Financial Management Services, Inc., and/or Financial Management Services and David Namer.

ON PETITION FOR REHEARING

Before, CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing, 680 F.2d 1088, on behalf of the United States obviously misses the thrust of our opinion in asserting that we questioned the integrity of Assistant United States Attorney Pauline Hardin. This is incorrect.

The crucial phrase in the affidavit in issue characterized Deputy Securities Commissioner Stansbury's ad hoc, oral opinion as a "classification." We held that this was an improper characterization of Stansbury's comments, which was so vitally material to the substance of the affidavit that misrepresentation would amount to reckless disregard for truth. In the alternative, we held that if the characterization was intended to convey no more than Stansbury's informal feelings about the security status of loan commitments, the affidavit was legally insufficient to support the warrant. Thus, it can be seen that we did not decide which characterization had been intended since neither would carry the point.

The court writes further solely to make clear that Ms. Hardin's integrity was not necessarily implicated in our decision

cast, as it was, in the alternative. Certainly her integrity was not impunged.